Supreme Court, U.S.
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No. 94-557

# In The
# Supreme Court of the United States
October Term, 1994

STATE OF FLORIDA, *et al.*,

*Petitioners,*

vs.

SAMUEL PLATT, *et al.*; JIMMIE LEE SADDLER, *et al.*; and BRENDA ASHLEY, *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari
to the United States Court Of Appeals
For The Eleventh Circuit

## REPLY BRIEF

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## QUESTION PRESENTED

Whether the 180 day statutory period allowed for filing administrative charges of discrimination with the EEOC was properly tolled for eight years during the pendency of an invalid and improperly certified class action brought in 1979 and vacated in 1987, under the rationale of this Court's 1974 tolling decision announced in *American Pipe and Construction Co. v. Utah*, as extended to Title VII cases by this Court's 1983 tolling decision announced in *Crown, Cork & Seal v. Parker*?

## PARTIES TO THE PROCEEDING

The parties to the previous litigation in the *Griffin v. Dugger* and *Griffin v. Singletary* cases were plaintiffs Peners L. Griffin and Henry L. Dejerinett; intervenors Alvin Smith and John D. Butler; defendants below were Richard Dugger followed by Harry K. Singletary, in his official capacity as Secretary, Florida Department of Corrections; the Florida Department of Corrections; Louie L. Wainwright, individually; and Raymond W. Gearey, individually.

The parties to the consolidated *Platt*, *Ashley* and *Saddler* cases now before this Court are plaintiffs Samuel Platt, Michael Anderson, Sandra Anderson, Gary Black, Nelson Brooks, Jr., Laurene Brown, Tommie Brown, Curtis Carter, Willie Clark, Julius Hope, Billy Givens, James Haynes, David Henderson, Jimmy Hodore, Mamie Jackson, Gary Jones, James McNealey, Iola Rivers, Johnnie Vance, Diane Walker, Jimmy Lee Saddler, Tom Carter, Jr., Lillie Mae Lewis, Blake T. Moore, Sr., Sylvia Jean Forward, Anthony Brown, Robert Hallback, Henry Chandler, Walter Everitt, Jr., Brenda Ashley, Bernice Hizine Atkins, Louise Baker, Gary Black, Ronald J. Baker, Sr., Nelson Brooks, Jr., Brenda Brown, Yvonne Hampton Brown, Horace Calhoun, III, David Babers, Dennis Cohen, Romeo Cozart, Cassandra Dickey, Willie Ewing, Willie Harpe, Marvin E. Jones, Mable Kilpatrick, Ronald Anthony Martin, Sylvia Anne Martin, Michael Oyefesobi, Eddie Lee Richardson, Dale Rogers, Marilyn McPherson Saucier; Sherrell R. Rosier, Eugene Shivalier, Norman Small, Dorothy Ann Solomon, Arbrea Spencer, Agness Marie Strange, Charles H. Thomas, Ruthene Tukes, and Shirley Washington; the defendants here are the State of Florida, Florida Department of Corrections and Harry K. Singletary, in his official capacity as Secretary.

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This Court's review is necessary in order to correct an appellate court panel decision which will adversely affect the orderly administration of justice in the federal district and appellate courts.

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*Respondents*.

## REPLY TO BRIEF IN OPPOSITION

Petitioners Harry K. Singletary, Jr. and the State of Florida Department of Corrections hereby reply to the brief in opposition filed by the respondents in this cause.

## OPINIONS BELOW

The 1987 opinion and decision of the Eleventh Circuit Court of Appeals is reported at 823 F.2d 1476 (*cert. denied*, 486 U.S. 1005). The two relevant orders of the district court on remand are reproduced in the appendix to the petition at pages 1a to 11a.

The opinion of the Eleventh Circuit Court of Appeals is reported at 17 F.3d 356 (March 29, 1994). A copy is reproduced in the appendix to the petition, at pages 12a to 23a. The order denying petitioners' suggestion for rehearing *en banc* is reported at 24 F.3d 256 (May 26, 1994). A copy is reproduced in the appendix to the petition, at pages 24a to 28a. The July 21, 1994 order denying respondent's petition for panel rehearing is reproduced in the petition appendix at pages 29a to 32a.

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## JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals to be reviewed was entered March 29, 1994. The order denying petitioners' suggestion of *en banc* rehearing was entered May 26, 1994. The final order denying respondents' petition for panel rehearing was entered July 21, 1994.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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## STATUTORY PROVISION INVOLVED

This is a Title VII case. The federal statute involved is Title VII of the Civil Rights Act of 1964, as amended, which was made applicable to the several states on March 23, 1972, and is

presently codified at 42 U.S.C. § 2000e *et seq.* Of particular importance here is the 180 day statutory period allowed for filing administrative charges under Title VII, presently codified at 42 U.S.C. § 2000e-5(e). A copy of the relevant portion of the statute is reproduced in the appendix to the petition at page 34a.

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## REPLY TO BRIEF IN OPPOSITION

### I. RELEVANT FACTS

Petitioners first object to respondents' continued use of the word "decertified," when the record is clear that the underlying class action below was *vacated* in 1987 by the first appellate panel. Respondents are also aware that the earlier erroneous rulings about the test were *vacated*, and respondents should know that by operation of law there never was a valid testing issue ever raised in the *Griffin* litigation. The testing class action was *void ab initio*, and was *vacated* not decertified.

Respondents' opening assertion on page 4 of their brief in opposition, that "[n]one of the respondents were parties to [the earlier *Griffin* litigation], and none have ever had the opportunity to litigate the factual basis of Mr. Griffin's standing or the timeliness of Mr. Smith's Title VII charge of discrimination", is belied by their very next assertion, that "[r]espondents are all former members of the certified class in the Griffin litigation...." If the members of the *Griffin* "certified class" were not parties, what were they? And more importantly, if respondents were not parties to the *Griffin* case, how do they have standing to be here today?

Respondents have always claimed that they have standing as parties; they did so by filing their motions to intervene as parties in the *Griffin* case after the defeat of their class claim in 1987; by filing their post-appeal motions to amend the *Griffin* complaint and to add some class members as parties; by filing

these three successor class actions and therein repeatedly relying upon (some of) the favorable facts found by the appellate court in the 1987 decision *vacating* their earlier class action; and by repeatedly asserting that as former class members they are entitled to the benefits of this Court's "generous" tolling rules at issue here.

It is far too late in the day for respondents to attempt to avoid the law of this case by claiming not to be parties to it; respondents are barred by the doctrines of *res judicata, collateral estoppel*, or both, from relitigating issues that were lost in the district court or in the first *Griffin* appeal. *See, Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), *cert denied*, 486 U.S. 1005 (1988).

On page 5 of their brief in opposition, respondents attempt to avoid the finding of the 1987 *Griffin* appellate panel, i.e. that Alvin Smith's EEOC charge was untimely filed, by asserting that the district court never considered that issue. That assertion is erroneous. The district court, when faced with defendants' clear proof of Smith's untimely charge, chose to avoid or ignore it and erroneously ruled that Smith could nevertheless intervene based upon the single-filing rule announced in *Otis v. Crown Zellarbach Corp.*, 398 F.2d 496 (5th Cir. 1968). *See, district court record*, document 150, page 6.

Then during the 1987 appeal, the respondents' counsel filed a copy of Alvin Smith's EEOC charge (which on its face is shown to be untimely filed); the panel correctly held that it was untimely. The appellate court then squarely addressed the single-filing rule issue, reversed the district court and *vacated* the class action for want of a proper class representative. *See, Griffin v. Dugger, supra*, 823 F.2d at 1492-1494. Respondents cannot avoid that clear law of this case by claiming not to know the basis upon which the 1987 panel found Smith's charge untimely.

Notwithstanding respondents' beliefs expressed on page 6 of their brief in opposition, questioning whether or not "the merits of the correctional officer exam were [ever] litigated," the record below clearly shows that the test (there were three different versions) was never requested through discovery; was never produced by the defendants below (because it was not their test); has never been subjected to any EEOC review; was never introduced as evidence; was never reviewed by the district court prior to the 1982 summary judgment finding that plaintiffs' statistics showed it had a disparate impact; and thus the testing issue still awaits a proper party plaintiff having standing to litigate the merits of the test(s), including defendants' proof of its 1976 validation.

Rather than litigating the merits of the test and its 1976 validation in the *Griffin* litigation, petitioners have steadfastly asserted that the original plaintiffs have always lacked Article III standing to raise the testing claim, and that no one else among the many intervening class members has ever filed a timely EEOC charge or otherwise exhausted their administrative remedies. Plaintiffs first said that they had Article III standing; the appellate court disagreed. Plaintiffs next said that Alvin Smith could rely upon the single-filing rule to intervene and rescue the testing claim; the appellate court disagreed. Respondents (and the second appellate panel below) now say that they can come forward many years later, file extremely late EEOC charges, avoid all prior error, ignore all adverse rulings and circumvent the law of this case by an extension and application of the *judicial* tolling rules to *administrative* proceedings. Petitioners disagree.

On page 7 of their brief in opposition, respondents attempt to discredit the fact that there were three different versions of the correctional officer test used by the defendants below, from 1969 until August 1982. The third version was created and validated in 1976 by the Florida Department of Administration (FDOA) which was not a party to the *Griffin* litigation. Florida law required the defendants to administer the FDOA's test, which they did until the

district court declared that it had a disparate impact in August 1982. The test was abolished by FDOA in 1983.

In 1986, after several unsuccessful attempts to limit the testing class to those members who took the third version (1976 to August 1982), plaintiffs and defendants below agreed to notify the class and also seek permission to appeal the issues of standing and failure to file timely EEOC charges. Both sides then told the Eleventh Circuit, when seeking the interlocutory appeal, that if defendants were correct, the litigation would be over; defendants were correct, but plaintiffs are still litigating.

## II. Course of Proceedings Below

During the damage phase of *Griffin*, defendants agreed to notice the entire class as asserted by plaintiffs (March 1972 to August 1982) in return for plaintiffs' agreement allowing defendants to seek interlocutory appeal pursuant to 28 U.S.C. §1292(b). These respondents appeared in the *Griffin* litigation then, as class members seeking relief, most alleging failing the test prior to October 15, 1979, when the *Griffin* litigation began. Of the estimated 1500 persons filing timely claim forms in the district court, some 800 later filed boiler-plate, consolidated EEOC charges, after the Eleventh Circuit vacated the class action (in September 1987). EEOC then merely sat on the late charges while plaintiffs sought reconsideration, and then sought review in this Court. EEOC appeared as *amicus* in the Eleventh Circuit proceedings seeking rehearing, but did not appear in this Court.

After this Court denied review in 1988, EEOC declared that (most of) the late-filed charges were timely, noted that the district court had earlier found disparate impact (that ruling was vacated), and issued a "cause" determination. Conciliation was declared a failure by defendants below, who prefer to litigate these legal issues in competent forums.

On page 9, respondents candidly acknowledge their post-trial, post-appeal attempts to resurrect the defeated *Griffin*

litigation by bringing these three successor class actions, and by attempting to relitigate the issues lost by their original class representatives. Petitioners were successful in the district court, which dismissed all class and individual claims for the very same reasons that the Eleventh Circuit had done so in 1987: failure to file timely EEOC charges. The district court was correct.

However, the second panel opinion has now sided with respondents, who believe that the temporal existence of a spurious, invalid and finally vacated class action can nevertheless toll the statutory time for filing EEOC charges for decades. Petitioners agree with the district court.

## III. Reply to the Argument

It is apparent that the gravamen of petitioners' position has been lost upon the respondents. The concept of tolling by this Court has always been meant for and applied to *judicial* actions, not to *administrative* proceedings. Tolling is not ever necessary in the EEOC's administrative arena, because the single-filing rule can and does act to *excuse* the filing of charges in proper cases. *See, Otis v. Crown Zellarbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

Respondents' attempt to extend this Court's *judicial* tolling rules and enlarge the EEOC's statutory charge-filing period is necessary to their case, only because the Eleventh Circuit has eliminated all hope of their reliance upon the single-filing rule. Respondents cannot avoid the law of this case, so they are seeking some new law here.

In every single case cited and relied upon by respondents, the district and appellate courts below have confused the issue of judicial tolling with its administrative counterpart, the single-filing rule. *See, Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988); *Bailey v. Sullivan*, 885 F.2d 52 (3rd Cir. 1989); *Bowen v. City of New York*, 106 S.Ct. 2022 (1986); *Lo Re v. Chase Manhattan Corp.*,

431 F.Supp. 189 (S.D. N.Y. 1977); *Edwards v. Boeing Vertol Co.*, 717 F.2d 761 (3rd Cir. 1983); *McDonald v. Secretary of Health and Human Services*, 834 F.2d 1085 (1st Cir. 1987); *Sharpe v. American Express Co.*, 689 F.Supp. 294 (S.D. N.Y. 1988). Such apparent confusion may be seen as necessary in the circuits that have rejected or have not followed the old Fifth Circuit's lead in *Otis v. Crown Zellarbach, supra*, 398 F.2d 496. But the single-filing rule is still alive and well in the Fifth and Eleventh Circuits, and deserves to become the law of the land by clear announcement of this Court, here and now. *See, Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981); *Calloway v. Partners National Health Plans*, 986 F.2d 446 (11th Cir. 1993); *Ezell v. Mobile Housing Bd.*, 709 F.2d 1376 (11th Cir. 1983); *Hill v. MARTA*, 841 F.2d 1533 (11th Cir. 1988); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992 (11th Cir. 1982); *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195 (5th Cir. 1984) *cert. denied* 469 U.S. 1073 (1984).

This issue is a very important one, affecting the orderly administration of justice in the several federal district and appellate courts. It was presented before by the *Griffin* plaintiffs and some of these respondents as *amici* to the Eleventh Circuit back in 1987, upon their motions seeking rehearing; and it was presented in 1988 to this Court, which denied review at that time.

This important issue is now back, giving this Court a clear opportunity to take it up squarely, hear all sides thoroughly, and decide the case for the benefit of all federal courts in need of this Court's wisdom and guidance.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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